Supreme Court, U.S.
FILED
JUL 29 2005
OFFICE OF THE CLERK

(11) (12)

Nos. 04-1203 and 04-1236

IN THE

Supreme Court of the United States

UNITED STATES, *Petitioner*

v.

STATE OF GEORGIA, *et al.*, *Respondents*

TONY GOODMAN, *Petitioner*

v.

STATE OF GEORGIA, *et al.*, *Respondents*

On Writs Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL DISABILITY RIGHTS NETWORK IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus National Disability Rights Network ("NDRN"), formerly the National Association of Protection and Advocacy Systems ("NAPAS") is the membership association of protection and advocacy ("P&A") agencies which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands). P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all people with disabilities in a variety of settings. In fiscal year 2004, P&As served over 76,000 persons with disabilities through individual case representation and systemic advocacy. In FY 2004, four percent of the individuals served by P&As were living in jails or prisons.

The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. P&As are particularly active in providing assistance to persons with disabilities under the Americans with Disabilities Act ("ADA"). Because of its national P&A membership and familiarity with the protections afforded by each state to persons with disabilities, NDRN has firsthand knowledge of the state laws and how they operate in practice. NDRN is thus uniquely suited to assist the Court in understanding the state law backdrop against which Congress

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[1] NDRN respectfully submits this brief in support of petitioners. No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

enacted the ADA, as well as the status of that backdrop today.

SUMMARY OF ARGUMENT

As this Court recognized in *Tennessee v. Lane*, 541 U.S. 509, 525 (2004), Congress enacted Title II of the ADA "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."

Nowhere is this problem of discrimination more pronounced than in the prison context where state facilities and services govern every aspect of a prisoner's life. Unequal access to facilities or services can extend the length of a prison sentence or cause serve physical injury.[2] A pattern of unequal treatment of prisoners is well documented in the case law.[3] A comprehensive survey of state law confirms that prisoners seeking protection against discrimination are met with significant gaps and weaknesses in state anti-

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[2] See *Noland v. Wheatley*, 835 F. Supp. 476, 480-81 (N.D. Ind. 1993) (describing the deplorable conditions prisoners with disabilities face when reasonable accommodations are refused); *see also Herndon v. Johnson*, 970 F. Supp. 703, 703 (E.D. Ark. 1997) (plaintiff with fused spine denied mobility aides and other assistive devices necessary for bodily functions). *Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999) (inmate who was deaf denied access to program allegedly required as precondition for parole).

[3] This Court in *Lane* cited several cases documenting the pattern of unequal treatment in the penal system: *LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (inmate with paraplegia unable to access toilet facilities); *Schmidt v. Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (inmate with double amputations forced to crawl around the floor of jail cell). 541 U.S. at 525.

discrimination laws. Even worse, some states have specifically exempted prisoners from the protection of state disability laws.

In *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 208-12 (1998), this Court held that the ADA applied in the prison context. However, the states of Michigan, Maine, and Georgia have all sought to limit ADA type protections for prisoners under state law.[4] In Michigan, for example, the state's anti-discrimination law specifically excludes a "state or county correctional facility with respect to an individual serving a sentence of imprisonment." Mich. St. Ann. §§ 37.2101 (1999). Thus, while state law is generally inadequate to address the needs of individuals with disabilities, it is particularly inadequate to protect prisoners. These prisoners need the protections and remedies afforded by the ADA.[5]

In Part I we briefly describe the ADA's coverage and its remedial scheme. In Parts II and III, we demonstrate that, when the ADA was enacted in 1990, thirty-four states had statutes that did not ensure access to state facilities and forty-nine states failed to provide access to state services in a manner equivalent to Title II. Finally, in Part IV, we demonstrate that state law remains inadequate today.

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[4] See pp. 28-30, *infra*.

[5] *See Love v. Westville Corr. Ctr*, 103 F.3d 558, 558-59 (7th Cir. 1996) (holding that, because inmate with quadriplegia was denied reasonable access to recreation facilities, the dining hall, and visitation facilities, he was also denied access to programs for substance abuse, education, church, work, and transition which were held in these inaccessible parts of the facility).

Without Title II, the ability of prisoners with disabilities to access important facilities and services would be greatly diminished.[6]

ARGUMENT

I. The ADA Provides Protection With Respect to Both State Facilities and State Services.

The ADA's coverage of state facilities and services has two main components: a general prohibition against discrimination in access to state facilities and services and a remedial scheme that deters such discrimination and provides appropriate relief when such discrimination occurs. Section 202, which prohibits discrimination in services, programs, and activities provides that:

> "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity,

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[6] In this brief, we rely heavily on the work of Professors Ruth Colker and Adam Milani in a recent article in the Alabama Law Review. Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (2002). This article surveys current state law in detail and concludes that absent the protections of Title II of the ADA, the protection available to persons with disabilities would be greatly diminished in a majority of states. In an appendix to the article, the authors attach a comprehensive state-by-state summary of state disability law as it relates to Title II of the ADA. See also American Bar Association Commission on Mental and Physical Disability Law, *Monograph on State Disability Discrimination Laws* (2005) (providing a more recent overview of state disability discrimination laws from all fifty states and the District of Columbia).

> or be subjected to discrimination by any such entity."

42 U.S.C. § 12132. When state facilities, including prisons, are not accessible, persons with disabilities are systematically denied the "services, programs, [and] activities" provided by the state. The ADA provides a remedial scheme so that plaintiffs may obtain injunctive relief and damages. It also allows a successful plaintiff to receive "a reasonable attorney's fee." Section, 505, 42 U.S.C. § 12205. This set of remedies gives states a strong incentive to provide access to facilities and services and provides adequate redress for a person who encounters discrimination by the state.

Since 1990, persons with disabilities have relied on Title II to challenge numerous discriminatory acts involving core governmental functions. Title II has been used to challenge discriminatory acts involving voting,[7] institutionalization,[8] education,[9] prisoners' rights,[10] law

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[7] See, *e.g.*, *New York ex rel. Spitzer v. County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000) (failure to ensure that polling places were accessible to people with disabilities violated Title II); *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (overbroad exclusion of individuals with mental illness from voting violated Title II).

[8] See, *e.g.*, *Olmstead v. L.C., ex rel. Zimring*, 527 U.S. 581 (1999) (unjustified institutional isolation of persons with disabilities violates Title II).

[9] See, *e.g.*, *Assoc. for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954 (2005) (students with disabilities sued university for failure to make accommodations, which caused a denial of access to programs and facilities); *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999) (student with disability sued to require university to make reasonable modification).

enforcement,[11] and public assistance programs.[12] Title II has been critically important in protecting the rights of persons with disabilities in prisons. Indeed, since prisons "control virtually every aspect of the lives of the individuals who must inhabit them, the types of barriers and discrimination they face are varied and pervasive."[13] As detailed below, the overwhelming majority of state laws have not adequately addressed the exclusion of people with disabilities from government facilities and services.

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[10] See, *e.g.*, *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998) (Title II applies to state correctional facilities).

[11] See, *e.g.*, *Barnes v. Gorman*, 536 U.S. 181 (2002) (plaintiff sued police department for injuries sustained while being transported in a van not equipped to hold a wheelchair).

[12] See, *e.g.*, *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002), cert. denied, 537 U.S. 1105 (2003) (exclusion of persons with disabilities from state health insurance program violated Title II).

[13] James R. Pingeon, *A Guide to Litigation Under the Americans with Disabilities Act in Prisons and Jails* (2000), available online at http://www.centerforpublicrep.org/page/73964;cat_id=769. See also, *e.g.*, *Armstrong v. Wilson*, 942 F.Supp. 1252, 1254-55 (N.D. Cal. 1996) (noting that, among other things, the California Department of Corrections' facilities and services were inaccessible to prisoners with disabilities because facilities did not have "visual alarms" to alert prisoners with hearing impairments of emergencies, because inmates with severe disabilities had been improperly classified and were, as a result, earning fewer credits against their sentences than non-disabled inmates, and because the range of vocational programs made available to inmates with disabilities was more limited than those made available to non-disabled prisoners); *Montez v. Romer*, 32 F.Supp.2d 1235 (D. Colo. 1999) (disabled prisoners were denied access to law libraries, visiting areas, yard areas, laundry facilities, dining halls, recreational facilities, bathing and restroom facilities, medical clinics, prison employment, vocational training, and rehabilitation services because of their disabilities).

II. At the Time the ADA Was Enacted, Individual State Laws Failed To Ensure Persons with Disabilities Access to State Facilities.

A. Coverage of State Facilities

Title II addressed important shortcomings in state law by prohibiting states from discriminating in access to all state facilities, such as prisons, court houses and schools, as well as public sidewalks, streets, and recreational facilities.

At the time Congress passed the ADA, thirty-four states had laws with one or more significant shortcomings. Four states lacked statutes that applied to state facilities other than buildings. For example, the state of Tennessee had a policy requiring accessibility in all "public buildings," but did not include other facilities such as streets, sidewalks, and recreational facilities. Tenn. Code Ann. § 68-18-202 (1990). *Id.* § 68-18-203(2) (1990).[14]

Furthermore, some state statutes which covered state facilities were too vague to be affective. For example, Nebraska's statute contained some specific requirements for

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[14] See also N.J. Stat. Ann. § 52:32-4 (1990) (public buildings required to "provide facilities for the physically handicapped") and *Doe v. Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001) (holding that some state facilities are not covered by public accommodation statute); Ohio Rev. Code Ann. § 3781.111(A) (2005) (historical text unavailable) (covers public buildings but not facilities), and *id.* §§ 4112.02(G), 4112.01(A)(9) (2005) (historical text unavailable) (discrimination in public accommodations prohibited, but definition of public accommodation does not explicitly include the state); Wis. Stat. Ann. § 101.13(2)(d) (1990) (covers public buildings but not facilities).

facilities accessibility and provided that the "Public Buildings Safety Advisory Committee *may* promulgate and implement codes. . . ." Neb. Rev. Stat. § 72-1122 (1990) (emphasis added). Thus it was left to the Public Buildings Safety Advisory Committee to decide whether to adopt standards to comply with vague requirements. *Id.* § 72-1108.

In all, thirty-four states had facility accessibility provisions with one or more significant shortcomings. These shortcomings standing alone provided Congress with sufficient justification for passing Title II. See *Hibbs*, 123 S. Ct. at 1980-81 (relying on shortcomings in only fourteen states).

B. Remedies With Respect to State Facilities

In prohibiting discrimination in access to state facilities, Congress recognized that "the rights guaranteed by the ADA are meaningless without effective enforcement provisions" and that "the inclusion of penalties and damages i[s] the driving force that facilitates voluntary compliance." S. Rep. No. 101-116, at 15 (1989). Congress was also aware of a report by the U.S. Commission on Civil Rights that found that seventy-six percent of state buildings were not accessible to persons with disabilities even though many states had statutes requiring that such buildings be accessible. See U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 39 (1983). Thus, Congress allowed persons with disabilities to recover damages and attorney's fees when states failed to comply with Title II. See Sections 203 and 505, 42 U.S.C. §§ 12133 & 12205.

At the time Congress enacted the ADA most states failed to provide equivalent relief for discrimination in access

to state facilities, thus depriving their accessibility "requirements" of any real meaning. For example, in 1990 the State of Georgia had a policy eliminating, "insofar as possible, unnecessary physical barriers encountered by handicapped * * * persons whose ability to participate in the social and economic life of this state is needlessly restricted when such persons cannot readily use government buildings, public buildings, and facilities used by the public." Ga. Code Ann. § 30-3-1 (1990).[15] The responsibility for the administration and enforcement of this policy, however, fell by statute to "[l]ocal governing authorities." See *id.* § 30-3-5(c). No private right of action for enforcement of this policy was available. Georgia and other states that did not provide meaningful enforcement mechanisms had no incentive to comply with their own accessibility statutes and failed to provide relief to individuals who suffered discrimination.

1. Private Right of Action for Damages

The private right of action for damages provided by Title II serves several important purposes. First, the threat of damages creates a strong incentive not to discriminate in access to state facilities. See *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980) (noting the deterrent effect of damage remedies on governmental conduct). Second, a person with a disability who suffers discrimination at the hands of the state should be able to recover for any

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[15] In this brief, all citations to state statutes are taken from the online databases on either Westlaw or Lexis. The citations to historical statutes were taken from the databases on those services for the year identified. Citations to current law are taken from the current statute databases and identified as 2005.

compensable harm that is attributable to the discrimination. *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). Finally, a damage remedy is particularly important when an individual is denied access to a state facility to which he may never return because he may lack standing to seek injunctive relief under this Court's precedents. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). *See, e.g., Gorman v. Bartch*, 152 F.3d 907, 911-12 (8th Cir. 1998) (holding ADA applicable to post-arrest transportation of person using a wheelchair). Thus, for some persons with disabilities, it may be that "damages [are] the only possible remedy." *Bivens*, 403 U.S. at 409.

A survey of state accessibility statutes in 1990 reveals that thirty-one states either did not clearly allow a person who was illegally denied access to a facility to sue for damages, or significantly restricted such relief. First, nineteen states provided no clear private right of action for facilities discrimination. For example, Alabama's statute had two provisions requiring state facilities to be accessible. See Ala. Code §§ 21-4-4, 21-7-2 (1990). Section 21-4-4 was enforced by the state fire marshal who could order compliance, see Section 21-4-7, while Section 21-7-2 could only be enforced by a misdemeanor penalty, see Section 21-7-5. Because a state prosecutor cannot bring a criminal action against the state, the misdemeanor penalty does not even apply to state discrimination. Thus, Alabama provided

no private right of action against the state for discrimination in providing access to the state's facilities.[16]

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[16] See also Ariz. Rev. Stat. Ann. § 34-438 (1990) (state has enforcement authority); Ark. Code Ann. § 20-14-302 (1990) (only penalty a misdemeanor) and *id.* § 20-14-610 (1990) (state has enforcement authority); Cal. Gov't Code § 4458 (1990) (government can "bring an action to enjoin a violation") and *Black v. Dep't of Mental Health*, 100 Cal. Rptr. 2d 39 (Ct. App. 2000) (affirming lower court's finding that state is not a "business establishment[ ]" covered by Cal. Civ. Code § 51 (1990); Ga. Code Ann. § 30-3-5 (1990) (state has enforcement authority) and *id.* § 30-4-3 (1990) (only penalty a misdemeanor); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing private right of action not effective until 1991); Idaho Code § 39-3201 (1990) (state has enforcement authority); Ind. Code Ann. §§ 22-9-8-1, -3 (2005) (see historical notes) (provisions allowing private right of action under Ind. Code Ann. § 22-9-1-2 (1990) not effective until 1994) and *id.* § 22-15-2-7 (1990) (state has enforcement authority); Md. Ann. Code art. 49B, § 5 (1990), and *Johnson v. Tufton Group, Inc.*, No. CIV. L-99-144, 2001 WL 210046, at *4 (D. Md. Feb 28, 2001) (only state agency may enforce art. 49B, § 5); Miss. Code Ann. § 43-6-11 (1990) (misdemeanor is only penalty specified) and *id.* § 43-6-123 (1990) (state given limited enforcement authority); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database) (no enforcement mechanism for violations); N.H. Rev. Stat. Ann. § 354-A:22 (2005) (see historical notes in 2005 database) (provision allowing private right of action effective in 1992); N.Y. Pub. Bldgs. Law § 50(1), 51 (1990) (no private right of action specified) and N.Y. Exec. Law § 296(2)(a) (1990) (does not clearly apply to the state); Neb. Rev. Stat. Ann. § 20-129 (1990) (misdemeanor is only penalty specified) and *id.* §§ 72-1119, 72-1124 (1990) (state given limited enforcement authority but misdemeanor only penalty specified); Okla. Stat. tit. 25 § 1402 (1990) (no private right of action specified); S.D. Codified Laws § 20-13-35.1 (2005) (see historical notes in 2005 database) (provision allowing private right of action added in 1991) and *id.* § 5-14-14 (1990) (state enforces building code); Tenn. Code Ann. § 68-120-205(b) (1990) (no penalty may be assessed against the state); Utah Code Ann. § 26-29-4 (1990) (state has limited enforcement

Second, in three additional states an individual could bring a private right of action, but could not recover damages (even for intentional discrimination).[17] Six other states did not provide adequate relief because of limits on the amount of damages that an individual could recover. In South Carolina, for example, a successful plaintiff's recovery of actual damages was limited to $5,000. See S.C. Code Ann. § 43-33-540 (1990).[18] Finally, three states allowed a private right of action for damages against the state but this remedy

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authority) and *id.* 26-30-4 (1990) (misdemeanor is only penalty specified); Wyo. Stat. Ann. § 35-13-203 (1990) (misdemeanor is only penalty specified) and *id.* § 16-6-501 (1990) (state given limited enforcement authority).

[17] See Colo. Rev. Stat. Ann. § 24-34-306 (1990) (allowing private right of action) and *City of Colo. Springs v. Conners*, 993 P.2d 1167, 1171 (Colo. 2000) (holding that Colorado Governmental Immunity Act bars compensatory damages against the state but permits equitable relief for civil rights violations allowed); Conn. Gen. Stat. Ann. § 46a-99 (1990) (injunctive relief only); N.C. Gen. Stat. § 168A-11(b) (1990) (allows declaratory and injunctive relief but not damages).

[18] See also Fla. Stat. Ann. § 768.28 (1990) (relief against state capped at $100,000); Kan. Stat. Ann. § 44-1005(k) (1990) ($2,000 limit on damages for pain, suffering and humiliation); Nev. Rev. Stat. Ann. § 651.090(1) (1991) (see historical notes in 1991 database) (Section 41.035 (1991) imposes a $50,000 limit on tort damages against state and state employees); Va. Code Ann. § 51.5-46(A) (1990) (allows compensatory damages but prohibits damages for pain and suffering); W. Va. Code Ann. §§ 5-11-13(c), 5-11-10 (1991) (see historical notes in 1991 database) (while compensatory damages are available in court, a complainant in an administrative proceeding could only receive incidental compensatory damages, the modern equivalent of $1,000 in 1977).

was not clearly available for discrimination involving all state facilities.[19]

2. Attorney's Fees

Attorney's fees, like damages, play a critical role in the enforcement of facility accessibility requirements. Enforcement rights laws is dependent to a large degree on causes of action filed by plaintiffs acting as "private attorney[s] general." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) ("If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the power of the federal courts.").[20] Without attorney's fees, an individual who has suffered discrimination may not be able to find an attorney willing to file an action on his or her behalf. See, *e.g.*, H.R.

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[19] See N.J. Stat. Ann. § 10:5-13 (1990) (allowing private right of action for violations of public accommodation statute) and *Doe v. Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001) (holding that public accommodation statute coverage is limited to the few state facilities listed in the statute); Ohio Rev. Code Ann. § 4112.99 (1990) (private right of action not clearly applicable to facilities other than "public buildings"); Wis. Stat. Ann. § 101.13(4) (1990) (private right of action not clearly applicable to facilities other than "public buildings" and recovery limited to costs, disbursements and attorney's fees).

[20] See generally S. Rep. No. 94-1011, at 2–6 (1976), part of the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, which added what is now Rev. Stat. § 722(b), 42 U.S.C. § 1988(b). The attorney's fee provision of the ADA, Section 505, 42 U.S.C. § 12205, was based on the Civil Rights Attorney's Fees Awards Act. H.R. Rep. No. 101-485, pt. 3, at 73 (1990). Thus, the discussion of attorney's fees in the legislative history of the 1976 statute is relevant to the ADA provision as well.

Rep. No. 94-1558, at 1 (1976) ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts * * *.").

The role of attorney's fees is particularly critical for prisoners, whose financial constraints would otherwise limit their ability to bring a valid civil rights claim. *See* Karen M. Koltz, Comment, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 Temple L. Rev. 759, 763 (2000) (recognizing that the "concerns that prompted Congress to enact the fee-shifting provisions are perhaps most pronounced in cases where the civil rights violation involves prisoners"); *see also Baker v. Ohio Dep't of Rehab. & Corr.*, 761 N.E.2d 667, 752 (Ohio Ct. App. 2001) (noting the difficult problems raised when *pro se* plaintiffs attempt to identify the various legal issues raised by an ADA case).[21]

Nevertheless, seven of the states that allowed some private right of action against the state did not provide for attorney's fees for a successful plaintiff.[22] Three states that

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[21] The Prison Litigation Reform Act ("PLRA") places significant restrictions on the relief available to prisoners, including limitations on the recovery of attorney's fees in any actions in which fees are authorized under the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1998. The Ninth Circuit has held that the PLRA's cap on attorney's fees does not apply in the context of the ADA, as the ADA has its own attorney's fee provisions. *See Armstrong v. Davis*, 318 F.3d 965, 974 (9th Cir. 2003).

[22] A person with a disability is generally guaranteed attorney's fees only if the state had an explicit attorney's fees provision applicable to state

covered facilities and allowed a full private right of action against the state for damages did not have an attorney's fees provision.[23] Four other states that allowed only a limited private right of action against the state for facilities violations did not allow attorney's fees.[24]

III. At the Time the ADA Was Enacted, Individual State Laws Failed To Protect Persons with Disabilities Against Discrimination in the Provision of State Services.

In addition to providing inadequate protection from discrimination in access to state facilities, states provided

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discrimination in providing access to facilities. See, *e.g.*, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269 (1975) (tracing origins and development of American rule, which provides that courts generally may not award attorney's fees absent a legislative instruction to do so); *Sutherland v. Nationwide Gen. Ins. Co.*, 657 N.E.2d 282–83 (Ohio Ct. App. 1995) (refusing to award attorney's fees to a plaintiff who sued under an Ohio anti-discrimination law allowing "other appropriate relief" because statute did not explicitly authorize recovery of attorney's fees).

[23] See Pennsylvania (section in current law allowing attorney's fees, see Pa. Stat. Ann. tit. 43, § 962(c.2) (2005), effective in 1991); R.I. Gen. Laws § 42-87-4 (1990) (relief provision does not include attorney's fees); Tex. Hum. Res. Code Ann. § 121.004(b) (1990) (same).

[24] See Colo. Rev. Stat. Ann. §§ 24-34-605, 24-34-306 (1990) (relief does not include attorney's fees); Conn. Gen. Stat. Ann. § 46a-99 (1990) (relief provision does not include attorney's fees); Kan. Stat. Ann. § 44-1005 (1990) (same); Ohio Rev. Code Ann. § 4112.99 (2005) (historical text unavailable) (allowing damages and "other appropriate relief" for some facilities violations) and *Sutherland v. Nationwide Gen. Ins. Co.*, 657 N.E.2d 281, 283 (Ohio Ct. App. 1995) (finding that Ohio Rev. Code Ann. § 4112.99 does not authorize attorney's fees).

even less protection with respect to state services. Many state laws failed to address state services at all, and many that did had substantial shortcomings in both the coverage and the remedies provided.

A. Coverage of State Services

When the ADA was enacted, twenty-six states provided no protection against disability discrimination in the provision of public services and programs. First, statutes in three states—Arizona, Kentucky, and Tennessee—did not cover persons with disabilities at all.[25] Second, in thirteen states, the general public accommodation statute either did not cover or was not enforceable against the state. For example, in Georgia, no civil remedies were provided in the statute; rather a violation constituted a misdemeanor and such a proceeding could not be brought against the state." See Ga. Code Ann. § 30-3-6 (1990).[26] In other states, the types of public accommodations covered by the statute did not expressly include state-run accommodations and services. See, *e.g.*, Cal. Civ. Code § 51 (1990) (prohibiting discrimination on the basis of physical disability by "business establishments"), and *Black v. Dep't of Mental*

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[25] See Ariz. Rev. Stat. § 41-1441 (1990); Ky. Rev. Stat. Ann. § 344.120 (1990); Tenn. Code Ann. § 4-21-501 (1990).

[26] See also Ala. Code § 21-7-5 (1990) (only penalty a misdemeanor); Ark. Code Ann. § 20-14-302 (1990) (same); Ga. Code Ann. § 30-3-6, (1990) (same); Idaho Code § 39-3210 (1990) (same); Miss. Code Ann. § 43-6-11 (1990) (same); Neb. Rev. Stat. § 20-129 (1990) (same); Utah Code Ann. § 26-30-4 (1990) (same); Wyo. Stat. Ann. § 35-13-203 (1990) (same).

Health, 100 Cal. Rptr. 2d 39, 42 n.4 (Ct. App. 2000) (violation a misdemeanor; no civil remedies).[27]

Finally, twenty states had statutes prohibiting disability discrimination with respect to general public accommodations, but these statutes did not clearly cover "services." For example, as the Supreme Court of Washington explained, "[w]hile entitlement to services may be in the ADA, the Legislature has not enacted a counterpart to the ADA in Washington creating such entitlements." *Fell v. Spokane Transit Authority*, 911 P.2d 1319, 1329 (Wash. 1996).[28]

Of the twenty states that failed to cover discrimination in the provision of services, ten also failed to cover the state (and hence already have been counted in the thirteen states listed above).[29] Ten additional states,

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[27] See also Del. Code Ann. tit. 6, § 4501 (1990) and Del. Op. Att'y Gen. No. 00-IB09 (May 30, 2000), 2000 WL 1092966 (Del. A.G.) (state is not covered by statute); N.H. Rev. Stat. Ann. § 155:39-b (1990) (providing a narrow definition of "public accommodation" that does not expressly include the state); N.J. Stat. Ann. § 10:5-5 (1990) (definition of "public accommodation" does not include state under *Doe v. Division of Youth & Family Services*, 148 F. Supp. 2d 462, 496 (D.N.J. 2001)); Wis. Stat. Ann. § 101.22(1m)(bp) (1990) (providing definition of public accommodation that does not expressly include the state).

[28] See Colker and Milani, 53 Ala. L. Rev. at 1093–94, for discussion of case and similar case in Ohio.

[29] See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); Utah Code Ann. § 26-30-1 (1990); Wis. Stat. Ann. § 101.22(9)(a) (1990); Wyo. Stat. Ann. § 35-13-201 (1990).

including Washington, had statutes that did cover the state, at least with respect to its buildings, but failed to cover services.[30]

Adding up the three states that had statutes that did not cover disability discrimination, the thirteen states that had statutes that did not cover the state, and the ten additional states that did cover the state but did not cover services, there were twenty-six states that failed to provide statutory protection against disability discrimination with respect to state services.

The failure of states to assure that individuals with disabilities are afforded equal access to state services has a particular impact on prisoners with disabilities. As this Court has recognized, "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in.'"). *Yeskey*, 524 U.S. at 210. Services offered prisoners serve an important rehabilitative function by preparing them

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[30] Fla. Stat. Ann. § 413.08(1) (1990) (public accommodations statute does not cover services), but see Fla. Stat. Ann. § 393.13 (1990) (covering services discrimination with respect to narrowly defined population of "developmentally disabled"); Ind. Code Ann. § 22-9-1-2(a) (1990); Md. Ann. Code art. 49B, § 7 (1990); Me. Rev. Stat. Ann. tit. 5, § 4551 (1990); N.Y. Exec. Law § 296(2)(a) (1990); Ohio Rev. Code Ann. § 4112.02 (2002) (historical text unavailable), see also *Davis v. Flexman*, 109 F. Supp. 2d 776 (S.D. Ohio 1999) (holding that statute does not apply to services); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database); Tex. Hum. Res. Code Ann. § 121.001 (1990); Vt. Stat. Ann. tit. 9, § 4502 (1990).

for "independent living and vocational rehabilitation." *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988).[31] Without equal access to prison programs and services, prisoners with disabilities are less likely to achieve rehabilitative goals of the prison system, and are more likely to fail upon their release.[32]

Moreover, the failure of many states to provide prisoners with disabilities equal access to state services can extend their time in prison. For example, in *Armstrong v. Wilson*, 942 F.Supp. 1252, 1255 (N.D. Cal. 1996), the court found that, among other things, "[s]ome inmates with severe

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[31] See also *Raines v. State*, 983 F.Supp. 1362, 1367 (N.D. Fla 1997) (prison official attesting that "assignments to work programs also have a rehabilitative aspect"); *Armstrong v. Wilson*, 942 F.Supp. 1252, 1256 (N.D. Cal. 1996) (noting that Rehabilitation Act's goal of fostering independent living for individuals with disabilities mirrors rehabilitative goals of prison system).

[32] Numerous cases confirm that prisoners with disabilities are routinely denied equal access to state programs and services while incarcerated. See, e.g., *Hicks v. Armstrong*, 116 F.Supp.2d 287, 290 (D. Conn. 1999) (prisoner with disability "was often segregated from other pretrial detainees and denied participation in many of the correctional facilities' educational programs, recreational activities and religious services. No efforts were made to accommodate his requests to participate or to make these programs accessible to him"); *Raines v. State*, 983 F.Supp. 1362, 1373 (N.D. Fla. 1997) (noting that structure of statutorily-created work program "exclude[d] persons with disabilities from enjoying the full opportunity to participate"); *Love v. McBride*, 896 F.Supp. 808, 809-10 (N.D. Ind. 1995) (prisoner with disability repeatedly denied access to "programs and services such as education, a group substance abuse program, the transition program, commissary, outside recreation, *** a prison job, *** education, and [use of] the law library" because of the need to confine him to a particular housing unit due to his disability).

disabilities have been inappropriately classified [in the prison work program] and only earn 1/3 instead of 1/2 time credits against their sentences." See also *Mitchell v. Mass. Dep't of Corr.*, 190 F.Supp.2d 204, 207-08, 212-13 (D. Mass 2002) (prisoner with disability denied opportunity to participate in prison programs and earn sentence-reduction credits).

B. Limitations in Coverage of State Services

We have established that only twenty-four states had any form of statutory protection against discrimination in the provision of state services. As we demonstrate below, many of those statutes failed to cover critical populations of persons with disabilities. They also by and large failed to require that states make reasonable modifications in such services to ensure that persons with disabilities would not be denied the benefits of public services. Finally, in many of the states, the remedies with respect to discrimination in public services were inadequate.

1. Definition of Persons with Disabilities

A critical step in preventing discrimination on the basis of disability is to define the protected class in a way that adequately covers the relevant physical and mental disabilities. Section 3(2) of the ADA defines "disability" to mean:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or

"(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

Surveying state law in 1990, numerous states failed to cover one or more of these categories. For example, Nevada and Kansas each had statutes that prohibited discrimination in the provision of services, but their coverage of persons with disabilities was limited to those with "physical and visual" impairments (Nev. Rev. Stat. Ann. § 651.070 (1991) (see historical notes in 1991 database) or those with a "physical handicap" (Kan. Stat. Ann. § 44-1009(c)(3) (1990)). Similarly, South Carolina prohibited discrimination against persons because of "handicap" but specifically excluded persons with "mental illness." See S.C. Code Ann. §§ 43-33-520, 43-33-560 (1990).[33]

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[33] The exclusion of persons with mental impairments was also pervasive in states which did not cover discrimination in the provision of state services as listed in Part A above. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Civ. Code § 51 (1990) (only covering physical disability) and Cal. Gov't Code § 12944 (1990) (specifically relating to licensing boards but only covering "medical conditions or physical handicap" and not "mental handicap"); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08(1) (1990) and Fla. Stat. Ann. § 393.13 (1990) (narrow coverage only for developmental disabilities); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-3201 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.D. Cent. Code § 48-02-19 (1991) (see historical notes in 1991 database); N.H. Rev. Stat. Ann. § 354-A:3 (1990) (excluding mental illness from the definition of "physical or mental disability"); Utah Code Ann. § 26-29-2 (1990); Wis. Stat. Ann. § 101.22(1m)(b) (1990) (narrow coverage only for developmental disabilities); Wyo. Stat. Ann. § 35-13-201(a) (1990).

In addition, eleven of the states that prohibited disability discrimination in the provision of public services failed to include in the protected class persons who are "regarded as" having an impairment and persons who have a "record of" an impairment.[34] For example, the Second Circuit drew a "stark contrast" between the scope of Connecticut's anti-discrimination law and the ADA.

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[34] See Conn. Gen. Stat. Ann. § 46a-64 (1990); Iowa Code Ann. § 601A.2 (1990); Kan. Stat. Ann. § 44-1002 (1990); Mass. Gen. Laws ch. 272, § 98 (1990); Mich. Comp. Laws § 37.1103 (1990); Mo. Rev. Stat. § 213.010 (1990) (definitions do not include "record of"); Mont. Code Ann. § 49-2-101 (1990) (according to 1991 statute annotation, until 1991 amendment neither group included in definitions); Nev. Rev. Stat. Ann. § 651.050 (1990) (according to 1989 Westlaw database and annotations to current statute, neither group was included in this statute or any others relating to persons with disabilities); Pa. Stat. Ann. tit. 43, § 954 (1990) (neither group included until this statute was amended in 1991); S.C. Code Ann. § 43-33-560 (1990); Va. Code Ann. § 51.5-3 (1990) (definitions do not include "regarded as").

Another eighteen states that did not have protection with respect to the state services also failed to include these elements in their definition of disability with respect to discrimination in public accommodations. See Ala. Code § 21-7-3 (1990); Ark. Code Ann. § 20-14-303 (1990); Cal. Gov't Code § 12926 (1990); Del. Code Ann. tit. 6, § 4501 (1990); Fla. Stat. Ann. § 413.08 (1990); Ga. Code Ann. § 30-3-1 (1990); Idaho Code § 39-4126 (1990); Ind. Code Ann. § 22-9-1-3(r) (1990); Md. Ann. Code art. 49B, § 5 (1990); Me. Rev. Stat. Ann. tit. 5, § 4553 (1990); Miss. Code Ann. § 43-6-5 (1990); Neb. Rev. Stat. § 20-127 (1990); N.H. Rev. Stat. Ann. § 354-A:3 (1990); Tex. Hum. Res. Code Ann. § 121.002(4) (1990); Utah Code Ann. § 26-29-2 (1990); Wash. Rev. Code Ann. § 70.84.010 (1990); Wis. Stat. Ann. § 101.13 (1990); Wyo. Stat. Ann. § 35-13-201(a) (1990).

Beason v. United Tech. Corp., 337 F.3d 271, 279-80 (2d Cir. 2003).[35]

The decision by many states to narrowly define "disability" in their anti-discrimination statutes has had a particularly negative impact on the prison population. "Many of the women and men who cannot get mental health treatment *** are swept into the criminal justice system after they commit a crime."[36] In fact, in the United States, there are three times more people with mental illness in prisons than in mental health hospitals.[37] As detailed above, at the time that Congress enacted the ADA, state statutes provided this particularly vulnerable group little, if any, protection.

2. Reasonable Modification

Another significant problem with many state statutes was their failure to require states to make even simple modifications to their services and programs to avoid excluding persons with disabilities from participating in such services and programs. In passing the ADA, Congress

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[35] See also *Mowat v. Transp. Unlimited, Inc.*, 894 F.2d 230, 232 (8th Cir. 1992), *citing Annear v. State*, 454 N.W.2d 869, 874-75 (Iowa 1990) (holding that Iowa's anti-discrimination statute does not provide a cause of action based on perceived disability).

[36] Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003), at 1, 18 available online at http: www.hrw.org/reports/2003/usa1003/usa1003.pdf., *citing* NAMI, *Criminalization of the Mentally Ill* (2001), at 1, available online at http://www.nami.org/Content/ContentGroups/Policy/criminalization2001.pdf.

[37] *Id.* at 18.

recognized that such a requirement was essential to ensure that discrimination could not persist under false rationales. The ADA defines a "qualified individual with a disability" as a person who,

> "with or without *reasonable modifications* to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

Section 201(2), 42 U.S.C. § 12131(2) (emphasis added).[38] Public entities, including states, are required to make "reasonable modifications" in order to insure that persons with disabilities can participate in and benefit from public services. Nevertheless, when Congress enacted Title II, few state laws contained an express obligation to make such modifications with respect to such services.[39]

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[38] The Attorney General's regulations issued pursuant to Section 204(a), 42 U.S.C. § 12134(a), interpret this definition to require a public entity to "make reasonable modifications in policies, practices, or procedures" as defined at 28 C.F.R. § 35.130(b)(7) (2003) (emphasis added).

[39] Minn. Stat. Ann. § 363.03(3)(2), (4)(1) (1991) (see historical notes in 1991 database), Mo. Ann. Stat. § 213.010(8) (1990), N.C. Gen. Stat. § 168A-3(10)(b) (1990); S.D. Codified Laws § 20-13-23.7 (1990) Four other states had statutes incorporating the "programs and activities" language from the Rehabilitation Act. See Haw. Rev. Stat. Ann. § 368-1.5(a) (1990); La. Rev. Stat. Ann. § 46:2254 (1990); Mass. Gen. Laws Ann. Const. Amend. CXIV (1990); Va. Code Ann. § 51.5-40 (1990). We note that courts in these states, like this court, could interpret such language to require reasonable modification, so the lack of a specific

3. Remedies

The remedies available under state law for violations of state accessibility requirements in the provision of state services were substantially more limited than the remedies available under Title II. Of the twenty-four states that did provide statutory protection against disability discrimination in the provision of state services, six failed to provide for damages as a remedy for violations by the state (even to remedy and deter intentional discrimination),[40] and another five significantly limited such damages.[41] Eight of the twenty-four states that covered services, eight did not allow successful plaintiffs to obtain attorney's fees for claims

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statutory requirement may be less troubling in those states. See *Alexander v. Choate*, 469 U.S. 287, 300 (1985) (construing statute to mean that "while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones").

[40] Colo. Rev. Stat. Ann. §§ 24-34-306, 24-34-605 (1990) (no compensatory relief); Conn. Gen. Stat. Ann. § 46a-99 (1990) (no compensatory relief); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing private right of action not effective until 1991); N.C. Gen. Stat. § 168A-11(b) (1990) (no damages); Okla. Stat. tit. 25 § 1402 (1990) (no compensatory relief); S.D. Codified Laws § 20-13-23 (1990).

[41] Kan. Stat. Ann. § 44-1005(k) (1990) (limited damages for pain suffering and humiliation to $2,000); Nev. Rev. Stat. Ann. § 651.090(1) (1991) (see historical notes in the 1991 database) (Section 41.035 (1991) imposes a $50,000 limit on tort damages against state and state employees); S.C. Code Ann. § 43-33-540 (1990) (limits actual damages to $5,000); Va. Code Ann. § 51.5-46A (1990) (no damages for pain and suffering); W. Va. Code Ann. §§ 5-11-13(c), 5-11-10 (1991) (see historical notes in 1991 database) (while compensatory damages are available in court, a complainant in an administrative proceeding could only receive incidental compensatory damages, the modern equivalent of $1,000 in 1977).

involving services.[42] Thus, Congress enacted the ADA, and Title II in particular, against a backdrop of ineffectual state law remedies.

IV. Invalidating Title II of the ADA Would Severely Undermine the Protections Currently Afforded to Persons with Disabilities in a Majority of States.

As we have seen, "only a minority of states actually have statutory protection against disability discrimination * * * similar to that found in ADA Title II."[43]

State definitions of disability continue to fall short of the ADA, resulting in far less protection under the state statutes. While eight states broadened their definition of disability to cover at least some persons with mental impairments,[44] and ten states have done so to include those

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[42] See Colo. Rev. Stat. Ann. §§ 24-34-605; 24-34-306 (1990); Conn. Gen. Stat. Ann. § 46a-99 (1990) (relief provision does not include attorney's fees); Kan. Stat. Ann. § 44-1005 (1990) (same); Haw. Rev. Stat. Ann. § 489-7.5 (1990) (provision allowing attorney's fees not effective until 1991);); Okla. Stat. tit. 25 § 1402 (1990) (relief provision does not include attorney's fees); Pennsylvania (section in current law allowing attorney's fees, see Pa. Stat. Ann. tit. 43, § 962(c.2) (2005), was added in 1991); R.I. Gen. Laws § 42-87-4 (1990); S.D. Codified Laws § 20-13-24 (1990) (no attorney's fees provision).

[43] Ruth Colker and Adam Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1113 (2002).

[44] Ariz. Rev. Stat. Ann. § 41-1492 (2005); Cal. Gov't Code § 12926 (2005); Del. Code Ann. tit. 6, § 4502 (2005); Kan. Stat. Ann. § 44-1002 (2005); Ky. Rev. Stat. Ann. § 344.010 (2005); N.H. Rev. Stat. Ann.

with a record of impairment or who are regarded as having an impairment,[45] over twenty states still have definitions of disability more limited than the ADA.

Statutes governing access to facilities remain inadequate in the majority of states. While six states have revised their statutes to allow damage suits against the state for failing to provide access to facilities,[46] none of the states that prohibited or limited such damages have abandoned these restrictions. Of the seven states that allowed a private right of action for damages but did not allow attorney's fees, only Pennsylvania has adopted such a provision.[47] Finally, none of the states that failed to require accessibility to all state facilities in 1990 has added such a requirement.

Lastly, state laws pertaining to services remain inadequate today. Since 1990 only four states—Kentucky,

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§ 354-A:2 (2005); Nev. Rev. Stat. Ann. § 651.050 (2005); Wis. Stat. Ann. § 106.52(c) (2005).

[45] Ariz. Rev. Stat. Ann. § 41-1492 (2005); Cal. Gov't Code § 12926 (2005); Kan. Stat. Ann. § 44-1002 (2005); Ky. Rev. Stat. Ann. § 344.010 (2005); Me. Rev. Stat. Ann. tit. 5, § 4553 (2005); Mo. Rev. Stat. § 213.010 (2005); Mont. Code Ann. § 49-2-101 (2005); Nev. Rev. Stat. Ann. § 651.050 (2005); Pa. Stat. Ann. tit. 43, § 954 (2005); Wis. Stat. Ann. § 106.52(c) (2005).

[46] See Ariz. Rev. Stat. Ann. § 41-1492.09 [B] (2005); Haw. Rev. Stat. Ann. § 489-7.5(a)(1) (2005); Ind. Code Ann. §§ 22-9-8-1, -3 (2005); N.D. Cent. Code § 14-02.4-20 (2005), and *State v. Haskell*, 621 N.W.2d 358, 360 (N.D. 2001) (finding damages are available under § 14-02.4-20); N.H. Rev. Stat. Ann. § 354-A:21 (2005); S.D. Codified Laws § 20-13-35.1 (2005).

[47] See Pa. Stat. Ann. tit. 43, § 962(c.2) (2005).

Maine, North Dakota and Vermont—have added statutes that prohibit the state from discriminating in the provision of its services.[48] Of the six states which covered state services but did not provide a private right of action for damages, only Hawaii and South Dakota have revised their statutes to allow such relief.[49]

The inadequacy of current state law may be most pronounced in the prison context, where prisoners currently receive even less protections under state statutes. For example, in *Doe v. Michigan Department of Corrections*, 601 N.W.2d 696 (Mich. Ct. App. 1999), the Michigan Court held that the Michigan Persons with Disabilities Civil Rights Act, Mich. Stat. Ann. § 37.1101, applied to prison inmates. This act provided that "a person shall not deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or a public service because of a disability." Mich. St. Ann. § 37.2101 (1999). In direct response to this holding, the Michigan legislature amended the state's anti-discrimination provisions to specifically provide that "a public service *does not include a state or county correctional facility with respect to an individual serving a sentence of imprisonment.*" *Id.* (emphasis added). Thus, Michigan law currently provides *no redress* to

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[48] Ky. Rev. Stat. Ann. §§ 344.120, 344.130 (2005); Me. Rev. Stat. Ann. tit. 5, §§ 4592, 4553 (2005); N.D. Cent. Code §§ 14-02.4-14, 14-02.4-15 (2005); Vt. Stat. Ann. tit. 9, §§ 4502(c), 4501(1) (2005).

[49] Haw. Rev. Stat. Ann. § 489-7.5 (2005) (effective in 1991), S.D. Codified Laws § 20-13-35.1 (2005).

incarcerated individuals with disabilities. *See Doe v. Dep't of Corr.*, 641 N.W. 2d 269 (Mich. Ct. App. 2002).

Similarly, at least one Maine court has held that its state prisons are not a "'place of accommodation' so that the [Maine Human Rights Act] might apply to the services and facilities it offers its inmates." *Napier v. State*, No. CV-00-042, 2002 WL 32068249, at *8 (Me. Super. Nov. 18, 2002). And in Georgia, the state Attorney General has construed the state disability law, Ga. Code. Ann. § 30-3-2 (2005), to exclude jail cells. 1984 Op. Atty. Gen. Ga. 84-61 (September 6, 1984).

The need for Title II of the ADA is as real now as it was in 1990. There can be no assurance that the state legislatures, which have made little progress since 1990, would rectify the deficiencies in their laws if this Court were to limit the scope of Title II as applied to the states.

CONCLUSION

For the reasons set forth in the Briefs for Petitioners and above, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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July 29, 2005